

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AT&T WIRELESS SERVICES, INC.,

Plaintiff,

v.

MORGAN & FINNEGAN, L.L.P.,

Defendant.

Case No. C03-0161L

ORDER GRANTING PLAINTIFF'S
SUPPLEMENTAL MOTION IN LIMINE
REGARDING ANDREW DILLON

This matter comes before the Court on plaintiff's "Supplemental Motion to Exclude or Limit the Trial Testimony of Defendant's Expert Witness Andrew Dillon." Dkt. # 147. Plaintiff argues that Mr. Dillon's proposed testimony regarding whether plaintiff was contributorily negligent and whether the approach set forth in the AWS 562 application was patentable was not adequately disclosed in his expert report and should not be presented to the jury at trial.

The Court agrees that defendant has not satisfied its obligations under Fed. R. Civ. P. 26(a)(2). The statements in the report that touch on contributory negligence and patentability are far too vague to constitute a complete statement regarding his opinions and the reasons therefor. In fact, when Mr. Dillon was made available for deposition, he clearly stated that he had not been asked to opine on either plaintiff's contributory negligence or the patentability of AWS 562. Dillon Dep. Tr. at 23, 26, 31, and 56. Defendant first disclosed an intent to have Mr.

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1 Dillon testify regarding plaintiff's negligence in the original pretrial submissions filed on
2 October 1, 2004. At no point prior to the filing of the second proposed pretrial order on April
3 22, 2005, did defendant indicate that Mr. Dillon would be asked to testify regarding the
4 patentability of AWS 562.

5 Defendant has not offered any justification for its failure to supplement Mr.
6 Dillon's expert report as required by Fed. R. Civ. P. 26(e)(1). As of July 2004, defendant was
7 aware that Mr. Dillon had opinions regarding plaintiff's negligence and the patentability of
8 AWS 562. Nevertheless, defendant made no attempt to incorporate those opinions into Mr.
9 Dillon's report or to otherwise correct the clear implication of Mr. Dillon's deposition
10 testimony, namely that he would not be offering formal opinions on those topics. While it could
11 be argued that, with regards to the contributory negligence opinions, plaintiff should have taken
12 it upon itself to resolve the inconsistency between Mr. Dillon's deposition testimony and the
13 October 2004 pretrial order, it is just as reasonable to place the burden of clarifying the scope
14 and nature of its expert's testimony on defendant. The federal rules of discovery clearly place
15 the disclosure and supplementation requirements on the party offering the expert: there is no
16 reason to deviate from the requirements of Fed. R. Civ. P. 26(a) and (e) in this matter.

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18 For all of the foregoing reasons, plaintiff's supplemental motion to exclude
19 testimony of Mr. Dillon is GRANTED. Although Mr. Dillon will be permitted to opine
20 regarding Morgan & Finnegan's lack of negligence (an opinion which implies that AT&T
21 Wireless, AT&T Corporation, and/or Perkins Coie was negligent), the practices and procedures
22 of the Patent and Trademark Office, and the statutory requirements of patentability, he will not
23 be permitted to provide a formal opinion regarding either contributory negligence or the
24 patentability of the approach set forth in the AWS 562 application.

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2 DATED this 2nd day of May, 2005.

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5 Robert S. Lasnik
6 United States District Judge
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